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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 00 274 51083

Office: VERMONT SERVICE CENTER

Date:

JAN 31 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

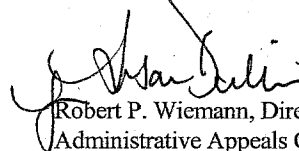
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation engaged in the wholesale distribution of gems and jewelry. It seeks to employ the beneficiary as its chief executive officer. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is a multinational executive or manager and that the Service's decision is in error.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily

managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated the beneficiary's job duties for the petitioner were essentially the same as they were for the claimed affiliated company in South Korea, except that the beneficiary's duties now focussed even more on business development.

The petitioner described the beneficiary's duties in South Korea as:

[I]n charge of developing and implementing all matters of corporate management. Specifically, his duties included overseeing the management of the company's finances; implementing the company's business development plan; negotiating and coordinating with the company's international business contacts; and directing the recruitment and training of employees.

The petitioner noted that the beneficiary would not be involved in the actual distribution of gems and jewelry but rather his task would be to oversee the entire operation.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return for its fiscal year beginning October 9, 1998 ending September 30, 1999. The Form 1120 revealed gross receipts in the amount of \$285,000 and compensation of officers in the amount of \$15,500. The 1120 did not reveal the amount of salaries paid. The petitioner's unaudited financial statement for the nine months ending June 30, 1999 revealed salaries paid in the amount of \$7,500.

The director requested additional information including a complete position description for all of the petitioner's employees including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The director requested in particular a comprehensive description of the beneficiary's duties and how the duties would be managerial or executive in nature.

In response, the petitioner provided job descriptions for the beneficiary's position of chief executive officer, for the corporate secretary/office manager, and two salesmen. The beneficiary's job duties were described on a weekly basis as follows:

6 - 8 hours: Develop business strategy and operational policies.

2 -4 hours: Prepare and lead staff meetings to: (i) establish concrete sales and marketing objectives, (ii) review purchasing strategies, (iii) monitor Gem & Pearl's overall progress, and (iv) review employee training and recruitment needs.

7 -9 hours: Liaise with Dae Jeong Gem & Pearl Company in South Korea (hereinafter "Dae Jeong Korea"), the

overseas parent company in Seoul, Korea, to monitor Dae Jeong Korea's international business contacts and devise strategy to increase and leverage such contacts for [the petitioner].

5 - 7 hours: Monitor and oversee financial status of [the petitioner]. Discuss company's finances and sales record with . . . the Corporate Secretary and Office Manager, and supervise his financial duties.

8 - 10 hours: Monitor business relationships with overseas gem and jewelry distribution sources.

10 -14 hours: Review extant research studies and perform independent study and research in gem and jewelry industry trends for next sales season.

2 - 3 hours: Miscellaneous - Meet with bankers, lawyers and other businesspersons.

The petitioner also provided a breakdown of the corporate secretary/office manager's duties stating that this individual was responsible for the day-to-day administrative functions of the company, as well as the financial duties. The petitioner also described two salesmen's duties stating that the salesmen were responsible for the sales operations of [the petitioner], including negotiating contracts and overseeing relationships with wholesale gem and jewelry buyers. The petitioner further provided its NYS-45 Form, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the last quarter of the year 2000. The NYS-45 depicted four employees and the annual wages of the petitioner's employees for the year as \$11,300 for the corporate secretary/officer manager, \$5,700 for one salesman and \$4,500 for the second salesman. The beneficiary's salary is depicted as \$39,000.

The director determined that the salaries paid to the corporate secretary/manager and the two salesmen did not evidence that these individuals were employed at a managerial level. The director also determined that the beneficiary would be engaged in non-managerial operational tasks rather than in executive or managerial duties. The director concluded that the petitioner had not established that an office the size of the petitioner could support a primarily managerial or executive position.

On appeal, counsel for the petitioner notes that the beneficiary has invested significant funds in the petitioner and asserts that the petitioner's business is complex and risky and requires sophisticated and experienced management. Counsel also asserts that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees and also manages an essential function. Counsel further asserts that the beneficiary has personnel decision-making authority and exercises discretion over the day-to-day operations of the activity over which the beneficiary has authority. Counsel asserts that in addition to meeting the necessary criteria of a "manager" the beneficiary qualifies as an "executive for the same reasons."

Counsel finally asserts that the low staffing levels, low salary rate, or office size should not lead to a finding that the proffered position is not in a managerial or executive capacity.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner submitted a broad position description that did not convey an understanding of what the beneficiary would be doing on a daily basis. The duties initially described were more indicative of an individual starting up a company rather than participating in an established concern.

The description of the beneficiary's duties in response to the director's request for evidence was more detailed but does not establish that the beneficiary will be primarily employed in a managerial or executive position. The description refers, in part, to duties such as "develop business strategy and operational policies," and "liaise with . . . the overseas parent company." The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. The description goes on to indicate that the connection with the overseas company is to monitor international business contacts to leverage such contacts for the petitioner. This further description is more indicative of someone who is performing the necessary operations of the petitioner to obtain products. Likewise, the monitoring of business relationships with overseas gem and jewelry distribution sources is more indicative of an individual providing a necessary service for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition to the 15 to 20 hours the beneficiary spends "monitoring" sources for the petitioner, the beneficiary spends 10 to 14 hours reviewing research and actually researching jewelry trends for the next season. Again the beneficiary is providing services for the petitioner. Based on the petitioner's representations the beneficiary is spending the majority of his time devoted to establishing sources for the petitioner and performing market research so that the petitioner is in tune with jewelry trends.

The beneficiary spends at most a quarter of his time leading staff meetings and discussing the petitioner's finances with and supervising the office manager. The petitioner does not provide evidence to support counsel's assertion that the office manager holds a managerial, supervisory, or professional position. Going on record without supporting documentary evidence is not

sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The office manager spends a majority of his time performing administrative duties related to bookkeeping and a minimal amount of time supervising the petitioner's salesman as well as performing sales duties himself. The petitioner's description of the office manager's duties does not conform to a description of a position that is managerial, supervisory, or professional. As the director noted, at the time of filing the petition the salaries of the petitioner's employees confirm that the employees were either part-time or were paid at an entry-grade level. The petitioner's attempt to upgrade the office manager's salary and the addition of a salesman after the petition was filed does not establish the beneficiary's eligibility at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

Counsel's assertion that the beneficiary also manages an essential function of the petitioner is also not persuasive. Counsel provides the petitioner's description of the beneficiary's duties as evidence of the beneficiary managing an essential function. As noted above, the description is more indicative of an individual providing basic services to the petitioner rather than managing a function through the work of others.

Counsel attempts to support his assertion that the beneficiary also meets the criteria of an "executive" by referring to the contentions made to support the beneficiary's "managerial capacity." However, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager. The elements set out in the statutory definition of "executive capacity" and "managerial capacity" are diverse and do not necessarily correlate one to the other.

Counsel's assertion that the Service must take into consideration the reasonable needs of the enterprise, if staffing levels are used as a factor in determining whether an individual is employed in a managerial or executive capacity is correct. It appears that the director based his decision partially on the size of the enterprise and the number of staff and did not clearly consider the reasonable needs of the petitioner as required by section 101(a)(44)(c).

At the time of filing, the petitioner was a two-year-old company engaged in the wholesale distribution of gems and jewelry that claimed to have a gross annual income of \$523,500. The firm employed the beneficiary as chief executive officer, a corporate secretary/office manager, and a salesman. Based on the petitioner's representations, the beneficiary was paid \$39,000 the

year the petition was filed. The petitioner paid its other staff, the corporate secretary/office manager and a salesman a total of \$17,000. As noted above, the second salesman was not employed until sometime after the petition was filed and does not contribute to a finding of eligibility at the time the petition was filed. The petitioner has not established that its reasonable needs could be met by the services of the beneficiary serving primarily as a chief executive officer, an office manager and only one salesman. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general in nature and are more indicative of an individual providing services to the enterprise rather than managing the enterprise. The record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in an executive or managerial capacity. The petitioner's description of the beneficiary's duties for the overseas entity is vague and general and does not convey an understanding of the duties of the beneficiary on a daily basis. Further, the record reveals that the overseas entity employed four managers and three staff to operate the overseas entity. The record does not contain information on the duties of the overseas employees and this lack of information coupled with the lack of a comprehensive description of the beneficiary's overseas duties does not allow a finding that the beneficiary was employed in either a managerial or executive capacity. As the petition will be dismissed for the reason stated above, this issue is not examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.